Response to call for evidence by the Independent Human Rights Act Review

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Submission by René Cassin, UK

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About René Cassin

René Cassin is a human rights organisation that promotes and protects universal human rights, drawing upon Jewish experience and values. We campaign and inform on issues such as genocide, discrimination, asylum, modern day slavery and human trafficking, women's rights, socio-economic justice, and general human rights protections.

Human rights are innate to Jewish values and the Jewish experience.

The Independent Human Rights Act Review

Introduction

We are pleased to respond to this call for evidence. Our evidence begins by explaining why the Human Rights Act (HRA) is important to the Jewish community, and how it has led to individuals being able to enforce their human rights in the UK in situations of particular significance to it. We go on to answer the specific questions put by the IHRAR panel based on two decades experience of analysing and promoting the HRA within the Jewish community which we summarise below:

Rene Cassin believes in keeping the HRA intact and that any amendments as suggested within the Independent HRA Review would be a retrograde step.

Why is the Human Rights Act important to us?

We believe that, as survivors of intolerance, persecution, and genocide and as 'speakers by experience' who understand the need for empathy and solidarity, the Jewish community has a uniquely authoritative voice in speaking out against the discrimination, marginalisation and persecution of individuals and groups.

Human rights are about the values we hold dear and the way we treat one another – values of dignity, fairness, equality, tolerance, and respect. We take our name from French Jewish Jurist, Monsieur René Cassin, who co-drafted the Universal Declaration of Human Rights in response to the horrors of the Holocaust. The hope expressed then for all future generations was in the words "Never Again" will humankind forget the importance of dignity and humanity. The Declaration aims to protect individuals from human rights abuse by the state and provides the foundation for the evolution of the modern international human rights framework, including the European Convention on Human Rights (ECHR) and the UK's Human Rights Act.

There were other Jewish lawyers who also played an important part in developing human rights standards. Hersch Lauterpacht developed the concept of crimes against humanity and Rafael Lemkin developed the concept of genocide. All three had lost family members in the Holocaust.

We are proud of the role that Britain took in developing the European human rights framework. Winston Churchill proposed and championed the ECHR whilst David Maxwell-Fyfe (the UK's Chief Prosecutor at Nuremberg and later a Conservative Home Secretary) drafted it. Indeed, the UK was the first country to ratify the ECHR in 1951.

René Cassin, the Jewish voice for human rights, welcomed the protections of the European Convention being brought into UK domestic law through the Human Rights Act in 1998 and coming into force in 2000.

It is Jewish values and Jewish history that thus provide the context for our commitment to the human rights framework and the HRA.

Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK?

René Cassin believes that Jewish people have an important stake in several human rights issues. The common theme is the importance of protecting the rights of minorities. In particular, we continue to see the importance of the HRA in people's lives in relation to the following issues:

1. Over the course of history people have been persecuted for being Jewish and for practicing the Jewish **religion**. The expulsion of Jews from England took place in 1290 under Edward I and Jews did not return to England until the 1650s when they were invited to resettle by Oliver Cromwell. Article 9 HRA, protects the right to freedom of thought, conscience and religion. In 2018 the High Court ruled that the Senior Coroner for Inner London must consider fasttracking the cases of Jewish and Muslim people because these faiths require a burial take place on the day of the death or as soon as possible thereafter.

2. **Slavery** is fundamental to the narrative of the Jewish people. The Jewish experience of slavery goes all the way back to the bible when the Israelites were slaves in Egypt, and we remember this every Passover. Most recently Jewish people were used as slave labour in Nazi Europe. The HRA, particularly article 4, has been used to strengthen the protection of women and men from slavery and to remove them from situation of slavery and exploitation. The HRA creates obligations that result in the investigation and prosecution of perpetrators and support and compensation for victims.

3. In Britain we are currently seeing a rise in **hate crime**, which affects all minority communities including the Jewish community and the recent rise in anti-Jewish hate speech. Article 10 HRA provides a right to freedom of expression. However, this is a qualified right meaning that speech can be limited if this is proportionate, for example if someone expresses views that encourage racial or religious hatred, such as anti-Semitism and anti-Jewish hate crime. The HRA provides a helpful framework within which to balance human rights in such cases.

4. Throughout history, the ability to seek refuge has been essential to Jewish survival and there are many occasions when Jews have become **refugees**. Article 3 HRA is used regularly to argue for those seeking sanctuary to be given protection if they face a real risk of serious harm if returned to their country of origin and they do not qualify under the Refugee Convention. Such return is a breach of their right to be free from torture and inhuman or degrading treatment. Article 3 was also used successfully to challenge state policy where lack of financial support for asylum seekers who delayed applying for asylum was causing homelessness and destitution; this policy was declared unlawful.

   However, in the UK today, those seeking refuge can be indefinitely locked up in **immigration detention** centres. Members of the Jewish community still remember internment during the Second World War when Jewish refugees from Nazi Europe were treated as 'friendly enemy

aliens'. The HRA provides boundaries around the legality of detention through article 5 (right to liberty and security) and article 6 (right to a fair trial). Meanwhile article 3 is invoked if detention is harming a detainee's mental or physical health.

5. **Gypsies, Roma and Travellers** share a history of persecution with Jewish people in being targeted by the Nazis during the Second World War. Today, these communities continue to be discriminated against and marginalised and to have their lives disrupted. The HRA's focus on private and family life (article 8) is particularly relevant when considering access to accommodation of Gypsies, Roma and Travellers as it protects the right to respect for an individual's home and family life.

6. Section 6 of the HRA requires that all public bodies (and private bodies providing a public service) including NHS organisations and others providing **health and social care**, have a duty to protect and respect people's human rights. As the UK recovers from the impact of Covid19, including disproportionate impacts on minority communities, such as the Jewish community, the HRA provides a blueprint for improving the experiences of everyone - service users, frontline workers, commissioners, and providers and ensuring fairer outcomes for all.

7. After the Holocaust and many times since, we have said 'Never Again' – but 'Again' continues to happen across the world. This has led to our work with the **Uyghur** community in the UK to raise concerns about the appalling treatment of Uyghur people experiencing genocidal acts in China. Our experience of the Holocaust resulted in the development of human rights frameworks and we are now able to support others being persecuted through a similar breach of human rights.

Conclusion

The issues detailed above provide examples of the importance of the HRA in improving people's lives in the UK, particularly vulnerable groups such as refugees and asylum seekers, Gypsies, Roma and Travellers, people who have been trafficked and other minorities. However, the HRA is a safety net that protects us all.

It signifies the importance of enabling people to rely on a domestic safeguarding framework where they can raise legal claims in the UK under the HRA. Human rights are the essential tools that empower us to stand up to people in power, and to create a stronger, fairer, more compassionate UK.

Drawing on Jewish experience, we cannot support any attempt to weaken a framework that gives practical expression to the idea that all people deserve to be treated with dignity and receive equal access to justice. The Human Rights Act protects victims of crime, the wrongly accused, disabled people, the mistreated, and the elderly. It has allowed countless people to pursue justice here in the UK and is an instrument the values of which should be respected, not diminished.

Reducing human rights protection here would also serve to undermine human rights progress around the world and have worrying ramifications for vulnerable Jewish communities across Europe.

This is an issue that strikes at the heart of both our specifically Jewish and our universal sensibilities.

In conclusion, the importance of the HRA to the Jewish community cannot be overstated.

Response to Questionnaire

René Cassin has two decades experience of analysing and promoting the Human Rights Act. During this time, we have followed the caselaw and regularly reviewed how the HRA works in practice for ordinary people in their everyday lives. In doing this, we have not found sufficient reason to change any of the mechanisms that the HRA works within. Our detailed responses are below but as a summary:

René Cassin believes in keeping the HRA intact and that any amendments as suggested within the Independent HRA Review would be a retrograde step.

Theme one

The first theme deals with the relationship between domestic courts and the European Court of Human Rights (ECtHR).

As noted in the ToR, under the HRA, domestic courts and tribunals are not bound by case law of the ECtHR, but are required by section 2 HRA to "take into account" that case law (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right. We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

Strasbourg jurisprudence provides a clear framework for HRA decisions. Without maintaining the relations between the domestic courts and the ECtHR, there would be real risk of greater legal uncertainty or a dilution of the content of Convention rights.

Specific questions

a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

Without the duty to take into account ECtHR jurisprudence, it would be difficult to know what people's rights are. Amending section 2 would cause jurisprudence up until now to be open to question. A gap might open up between what the ECtHR requires and what is applied in the UK leading to uncertainty as to what the courts will decide in relation to our rights. More cases would end up having to go to court. As a living instrument, the ECHR keeps up with current social mores. Cases that go to the ECtHR provide an opportunity for this to happen.

b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

Allowing public authorities a degree of latitude in making decisions enables them to assess the issue and to balance the rights of the individual with other public policy considerations such as social policy or allocation of resources. We do not think this should be changed. Any increase in the latitude given to public authorities would increase the risk of denying a remedy to people whose rights have been breached.

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

The current system of judicial dialogue demonstrates a good balance between enabling the ECtHR to understand the UK's legal and social context whilst ensuring a level of accountability for the UK courts including positive dialogue that is evidenced by the decisions in *Z and Others v UK* [2001] 2 FLR 612 and *Al-Khawaja* and *Anor v UK* [2011] (Applications nos. 26766/05 and 22228/06).

Theme Two

The second theme considers the impact of the HRA on the relationship between the judiciary, the executive and the legislature.
We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.

The HRA is the tool that allows individuals to challenge decisions and hold the government/public authority to account if the law is wrong. We believe that the current balancing between the roles of the courts, Government and Parliament provides the right safeguards between these roles and does not need amendment. It provides a common floor for rights across all four administrations in the UK.

The current requirement for Ministers responsible for new legislation to make statements of compatibility before Second Reading allows for timely parliamentary scrutiny, with the Joint Committee on Human Rights taking a lead role.

Specific questions

a) Should any change be made to the framework established by sections 3 and 4 of the HRA?

We do not believe that the framework set out in Sections 3 and 4 needs to be changed. The Act has finely balanced the roles of parliamentary sovereignty, the rule of law and the legislature.

In particular:
i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

Section 3 makes the assumption that Parliament intended laws to respect human rights. This fits the HRA's role as one of a class of constitutional statutes defining the rights of the individual and the obligations of public authorities: see e.g. *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin). There is no need to amend this.

ii. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts? **See above**

iii. Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

When a court makes a declaration of incompatibility under s.4 of the HRA it is Parliament that decides how, and if, to fix the law. This provides a good balance between the courts and Parliament. It is important to note that a declaration of incompatibility is non-binding. This preserves balance between the three branches of government.

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

We have not come across any issues resulting in the need to derogate from the ECHR.

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

We believe the current system allowing for the courts to strike down subordinate legislation strikes the right balance. This is because secondary legislation does not have the same amount of scrutiny in Parliament as primary legislation because it does not have the same status.

d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

We believe that the state should continue to be accountable for its actions, regardless of where those actions take place.

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

The system of having remedial orders considered by the Joint committee on Human Rights is effective as legal implications can be taken into account. There is no need to allocate more parliamentary time and resources to this.

END